(2)

No. 91-856

In The

Supreme Court of the United States

October Term, 1991

JERRY COCHRAN,

Petitioner,

vs.

AMERICAN ABRASIVE METALS CO., DEVOE & RAYNOLDS CO., HOECHST CELANESE CORPORATION, GROW GROUP, INC., and PALMER INTERNATIONAL, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

CONSOLIDATED BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ALBERT H. PARNELL, P.C., Esq.
KIMBERLY A. HOUSTON, Esq.
FREEMAN & HAWKINS
Suite 2800, Two Peachtree Tower
Atlanta, Georgia 30383-2606
404/522-0856
Attorneys for Respondents Devoe and Raynolds Co., Hoechst Celanese Corporation, and Grow Group, Inc.

J. WAYNE PIERCE, Esq.
Law Offices of
J. WAYNE PIERCE, P.C.
Suite 400
2839 Paces Ferry Road
Atlanta, Georgia 30339
404/435-0500
Attorneys for Respondent Palmer International, Inc.

WILLISTON C. WHITE, Esq.
FORTSON AND WHITE
200 Atlanta Financial Center South
3333 Peachtree Road, N.E.
Atlanta, Georgia 30326
404/239-1900
Attorneys for Respondent American Abrasive Metals Co.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a product liability action involving a sailor aboard a ship mandates the application of federal admiralty and general maritime jurisdiction.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION, STATUTES AND REGULATIONS

OPINIONS BELOW

Petitioner has provided the decision of the United States Court of Appeals for the Eleventh Circuit in *Cochran v. E.I. duPont de Nemours*, Nos. 90-8113 and 90-8535, slip op. (11th Cir., June 19, 1991), and has provided the Order of the Honorable Orinda D. Evans, Judge, United States District Court for the Northern District of Georgia entered on November 2, 1989 and January 4, 1990 as Appendix A and Appendix B respectively, to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

Respondents agree with petitioner's statement of jurisdiction.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Respondents agree that Petitioner contends that U.S. Constitution Article 3, §2 and 28 USC § 1333(1) represent the constitutional provisions and statutes pertaining to the exercise of admiralty jurisdiction. Respondents deny that admiralty jurisdiction, under any provision, statute or regulation, is applicable in this case.

STATEMENT OF CASE

This is a personal injury product liability action in which Petitioner Jerry Cochran (hereinafter "Cochran",

"Petitioner", and/or "Jerry Cochran") alleges that between 1972 and 1974, he was exposed to and injured by products manufactured by Respondents herein. The original complaint was filed June 30, 1987 against Respondent American Abrasive Metals Company. R.1-1. On May 13, 1988, Petitioner filed his First Amended Complaint adding, *inter alia*, Hoechst Celanese Corporation, Grow Group, Inc. and Devoe and Raynolds Company and Palmer International, Inc., the remaining Respondents, as party Defendants therein. The jurisdiction of both the original Complaint and First Amended Complaint were based upon diversity of citizenship. R.1-1, R.1-25. On August 16, 1989 Respondents filed a Motion for Summary Judgment in the United States District Court for the Northern District of Georgia, based upon a number of legal and factual issues including the statute of limitations and lack of product identification. R.4-141, 144, 166. Petitioner filed his Second Amended Complaint in the United States District Court for the Northern District of Georgia on October 6, 1989, alleging admiralty jurisdiction. R.6-164, 166.

Summary Judgment was entered in favor of Respondents herein by the United States District Court For the Northern District of Georgia on November 2, 1989 on the grounds that the exercise of admiralty jurisdiction was not proper and that Jerry Cochran's claims were time-barred under the applicable state law. R.6-171. It is from this Order that Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit. R.7-191.

On June 19, 1991 the United States Court of Appeals for the Eleventh Circuit rejected, *inter alia*, Petitioner's contentions that because he was exposed to dust while

working as a sailor aboard a naval vessel on navigable waters both at sea and at port, his products liability claim fell within the ambit of maritime jurisdiction. Presented with these issues the United States Court of Appeals for the Eleventh Circuit declined to extend admiralty jurisdiction to Cochran's claims. These are the precise factual and legal issues pending before this Court in the Petition for Writ of Certiorari.

STATEMENT OF FACTS

Petitioner, Jerry Cochran, was employed by the United States Navy from approximately October 1972 to 1974 during which time he alleges he contracted an occupationally-related disease. (R.1-1 and Deposition of Jerry Cochran, January 5, 1989, (hereinafter "Cochran I") at 218-219). Specifically, Jerry Cochran alleges exposure to Respondents' products while assigned to the USS Independence on a painting/grinding crew for approximately 9 months in 1972. (Deposition of Jerry Cochran, March 1, 1988 (hereinafter "Cochran II") at 134-135). During this time period, the USS Independence was home-ported in Norfolk, Virginia. (Cochran I at 218-219). A large percentage of this time was devoted to an overhaul of the vessel while the vessel was not at sea. (Deposition of Eugene Dickerson, March 4, 1982 at 26). Jerry Cochran's responsibilities on the grinding crew required him to patch worn areas of non-skid floor covering, grind it down, sweep it up and reapply the paint. (Cochran I at 35-37). Non-skid floor covering is a type of paint manufactured by Respondents and is used for a variety of purposes. (R.6-170, R.5-156-158). One purpose is to coat surfaces to

avoid slippage and one such use is on the decks of marine vessels. *Id. See also* (Deposition of Eugene Dickerson, March 4, 1982, at 37).

The United States Navy published a performance specification MIL-D-23003 which applied to the purchase of non-skid paint. (R.5-154). Respondents, among others, were approved suppliers of non-skid paint and were listed as such on the qualified product list published by the United States Navy. *Id.* Non-skid paint products were not sold solely for maritime use. (R.6-170, R.5-156-158).

In 1974, Jerry Cochran was diagnosed by physicians as having sarcoidosis. (R.6-170, Cochran I at 81). Sarcoidosis is an idiopathic disease – a disease of unknown origin. Sarcoidosis is a disease which can affect many systems of the human body and oftentimes affects the lung. It has been noted that the disease commonly occurs among young black males who reside in the southeastern United States. (Deposition of Dr. David Groth, May 3, 1989, pp.56, 60-62). Jerry Cochran is a black male from the southeastern United States and was within the at-risk range when he contracted sarcoidosis. *Id.*

In 1975, Jerry Cochran was formally discharged from the Navy and returned home to Albany, Georgia where he continued to seek medical treatment. (R.6-170). He received diagnoses of sarcoidosis from various sources from 1975 to 1979 and a diagnosis of schizophrenia in 1977. *Id.*

For over 10 years prior to filing this lawsuit, Mr. Cochran saw numerous physicians in an attempt to causally relate his illness to his employment in the United States Navy. (Cochran I at 127, 141, 144, 151-152, 156, 167, 169, and 174).

Tissue biopsies were taken from Cochran's lymph nodes in 1974 to determine the cause and extent of Cochran's illness. In 1984, a tissue analysis was performed by the Armed Services Institute of Pathology on the 1974 tissue, at Jerry Cochran's request, to determine the causal relationship, if any, between his condition and his exposure to nonskid paint. (R.4-146, Exhibit C). The presence of silica was noted in the tissue on February 15, 1984 and Cochran was so informed in March 1984. *Id. See also* R.6-170 and Cochran I at 169.

A September, 1986 discharge summary from the Veterans Administration Hospital indicated that Jerry Cochran was competent and able to work. (R.6-170). However, Jerry Cochran has not been gainfully employed since his discharge from the U.S. Navy. (Cochran II at 167, 168).

Jerry Cochran underwent an elective transbronchial biopsy of the lower left lung in May of 1987. A report from the staff pathologist at the Veterans Administration Hospital indicated that he saw no change from the biopsy performed in 1984. R.6-170. Jerry Cochran did not file his original complaint until June 30, 1987. R.1-1.

RESPONDENTS ARGUMENT AGAINST THE GRANTING OF A PETITION FOR WRIT OF CERTIORARI

Rule 10 of the Rules of the Supreme Court of the United States sets forth the basis upon which a Writ of Certiorari may be granted. The Rule reads in pertinent part:

> 1. A review on writ of certiorari is *not a matter of right*, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

U.S. Sup. Ct. Rule 10.

Despite Petitioner's assertion to the contrary, there are no compelling reasons to justify the granting of a Writ of Certiorari with regard to the United States Court of Appeals for the Eleventh Circuit opinion in *Cochran v. E.I. duPont de Nemours*, Nos. 90-8113, 90-8535, slip op. (11th Cir., June 19, 1991, hereinafter "Cochran Appellate Decision"). The Cochran Appellate Decision is neither in conflict with the decisions of the United States Supreme Court nor the various circuit courts of appeal. Moreover,

as will be discussed below, the Cochran Appellate Decision is not in conflict with the decisions cited by Petitioner in support of his reasons for granting the writ of certiorari.

For example, Petitioner first argues that the Cochran Appellate Decision is in direct conflict with *McDermott International v. Wilander*, 498 U.S. ___, 112 L.Ed.2d 866, 111 S.Ct. 807 (1991) and *Sisson v. Ruby*, 497 U.S. ___, 111 L.Ed.2d 292, 110 S.Ct. 2892 (1990). A careful analysis however, of these cases indicates that the Cochran Appellate Decision, as well as the cases relied upon by the Eleventh Circuit in that decision, are not in conflict with the United States Supreme Court.

In *McDermott*, this court addressed the issue of the status of a seaman for purposes of the application of the Jones Act. The Cochran Appellate Decision does not involve the Jones Act and its holding is not contingent or reliant upon the fact that Cochran was or was not a seaman. In fact, the Eleventh Circuit held that Cochran was a naval officer who performed work upon a ship at sea. Admiralty jurisdiction was found to be lacking by the Eleventh Circuit for reasons having no bearing on whether Petitioner was or was not a seaman.

Petitioner next argues that the Cochran Appellate Decision is in direct conflict with the United States Supreme Court's opinion in *Sisson* based upon an improper reliance upon *Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1046 (11th Cir. 1989) by the Eleventh Circuit. Petitioner's assertions in this regard are without merit.

First, it is important to note that *Lewis Charters* was cited by this court in *Sisson*. Second, although at first glance, *Sisson* and *Lewis Charters* appear factually similar, the divergent outcomes are consistent with the analysis established by this Court. Both cases involved fires which originating on marine vessels which resulted in damage to other vessels. Petitioner urges error merely because the results differed. However, the analysis employed by both courts with regard to the application of admiralty jurisdiction is consistent with that utilized in Cochran Appellate Decision.

In *Lewis Charter,* the origin of the fire occurred on a boat which was in a paint facility in a marina shipyard. In *Sisson,* the fire occurred on a vessel in navigable waters at the marina. In *Sisson,* this court held that storage and maintenance of a vessel at a marina on navigable waters in that situation bore a substantial relationship to traditional maritime activity in that the spread of a fire to various vessels in navigable waters at the marina could effect maritime commerce. *Sisson,* 110 S.Ct. at 2898.

The Eleventh Circuit in *Lewis Charters* specifically found that navigation was not affected and could in no way be affected by the fire in that case because the fire would not impact other vessels engaging in commerce in those waters. *Id. Lewis Charters,* 871 F.2d at 1052. Admiralty jurisdiction was held not to apply to the facts in *Lewis Charters* because a resolution through the application of admiralty law would have no impact on maritime commerce. *Id.* at 1051-1052.

Moreover, the Eleventh Circuit determined that although Cochran satisfied the "locality test" for admiralty jurisdiction, he failed to satisfy the "nexus test" as defined by this court in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493 (1972). Specifically, the facts as adjudged by the United States District Court for the Northern District of Georgia and by the United States Court of Appeals for the Eleventh Circuit show that the use of non-skid paint, manufactured by Respondents herein, was not an instrumentality used specifically for maritime purposes and further that Cochran's alleged lung injury afflicts literally thousands of land-based workers as opposed to being an injury unique to or related to maritime commerce. Therefore, the Eleventh Circuit held that Petitioner could not "show a discernible relationship between his exposure and the traditional maritime activities involving navigation or commerce on navigable waters." This is the precise factual and legal analysis adopted by this court.

Last, Petitioner argues that the Cochran Appellate Decision is in conflict with the decision of the Ninth Circuit in *Martinez v. Pacific Industrial Service Corp.*, 904 F.2d 521 (9th Cir. 1990). In support of this proposition, Petitioner argues the mere fact that admiralty jurisdiction was applied to a situation involving a maintenance man cleaning boilers on a ship, the Eleventh Circuit decision is contrary to that of the Ninth Circuit. In *Martinez*, the plaintiff was injured while using equipment with an operations manual designed for use by the Navy. The injury in *Martinez* was caused by pressurized water and was of the type that is likely to occur at sea. While it is true that Petitioner, at least arguably, was involved in

maintenance of a vessel, neither the instrumentality used, his alleged injury nor the method of sustaining those injuries were present in *Martinez*. Factually and legally, the cases are distinguishable. There is nothing present in the case at bar which indicates that there is a significant relationship or connection to maritime navigation or commerce. Even the *Martinez* court held that where the injury and instrumentality bear no particular connection to maritime navigation or commerce, admiralty law may not apply to the particular case. *Id.* at 525.

The alleged injury in the instant case is not specifically related to any type of maritime equipment and is the type that commonly occurs on land. Accordingly, there is no conflict between the circuits regarding the applicability of admiralty jurisdiction. More importantly, any conflicts which might have existed have been resolved by this Court's decision in *Sisson v. Ruby*, 110 S.Ct. 2892 (1990).

Thus, in harmony with the United States Supreme Court and the Circuits, the Eleventh Circuit found that Cochran's injuries and the instrumentality involved in those injuries were not connected to traditional maritime concerns and thus the resolution of Cochran's claims would have no impact on traditional maritime commerce. This being the case, the Eleventh Circuit, consistent with this court's analyses held the application of admiralty law in this case is improper.

Rule 10 of the Rules of the Supreme Court of the United States does not mandate certiorari in all cases. Rule 10 merely states that "[a] petition for a Writ of Certiorari will be granted only when there are special and

important reasons therefore." Petitioner herein has demonstrated no special or important reasons for the granting of the Petition for a Writ of Certiorari. Contrary to petitioner's assertions, the Cochran Appellate Decision is not in conflict with the decisions of this court or other circuits. Rather, the Cochran Appellate Decision is based upon the established precedent of this court and further promotes the general uniformity of the law of admiralty.

Accordingly, the Petition for Writ of Certiorari should be denied.

DISCUSSION

FEDERAL ADMIRALTY JURISDICTION DOES NOT APPLY MERELY BECAUSE INJURIES ARE ALLEGED TO RESULT FROM EXPOSURE ON A SHIP IN NAVIGABLE WATERS.

A. Location Test, The Historical Framework.

Article III, Section 2 of the United States Constitution grants exclusive jurisdiction of admiralty in maritime cases to the federal courts. U.S. Const. art. III, §2. "Congress has elaborated on this jurisdictional grant by providing that the federal district courts shall have original jurisdiction, exclusive of the courts of the states, of: (1) any civil case of admiralty or maritime jurisdiction, saving to suitors [cits. omitted] in all cases under all other remedies to which they are otherwise entitled [cits. omitted]". *Admiralty – The Fourth Circuit falls in line – Oman v. Johns-Manville Corp.*, 22 Wake Forest L. Rev. 253 (1987).

Historically, the traditional test of federal admiralty jurisdiction was the "locality" test. If a tort occurred on navigable waters, an action was cognizable in federal court under admiralty jurisdiction. *Id.* at 257. However, the "locality only" test has been replaced and is no longer the basis upon which admiralty jurisdiction is applied in tort cases. *Executive Jet Aviation, Inc. v. City of Cleveland*, 490 U.S. 249, 34 L.Ed.2d 454, 93 S.Ct. 493 (1972).

B. A Maritime Nexus is Necessary to Establish Federal Admiralty Jurisdiction.

In 1850, admiralty scholar Judge Benedict expressed his "celebrated doubt" as to whether admiralty jurisdiction should depend exclusively upon the locality of a tort and as to whether there should be some nexus between the tort and a maritime concern. *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 257 (1972). Prior to *Executive Jet*, some lower federal courts had considered and required some nexus between a tort and maritime activity to establish federal admiralty jurisdiction over the action on the tort. *Executive Jet, supra*, at 257-258. *See also* Wake Forest Law Review, *supra*, at 257-259. In *Executive Jet*, the United States Supreme Court held the nexus test to be the applicable standard and restricted the scope of the exercise of federal admiralty jurisdiction. This Court stated, "it is far more consistent with the history and purpose of admiralty to require also that the wrong bear a *significant* relationship to *traditional* maritime activity." *Executive Jet, supra*, at 268 (emphasis added). The rationale for this holding is twofold: (1) the exercise of admiralty jurisdiction tends to preempt matters traditionally regulated by

the states, and (2) admiralty law is intended to deal with navigational rules such as the manner in which vessels travel, seaworthiness and cargo damage. *Id.* 269-73.

This Court's decision in *Executive Jet* was limited to its facts which involved an airplane accident. To the extent there was any confusion as to whether the nexus test enunciated in *Executive Jet* applied more broadly to all tort actions, that question was answered in *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 73 L.Ed.2d 300, 102 S.Ct. 2654 (1982). In *Foremost*, the Court held that satisfaction of the nexus test was a prerequisite to any exercise of federal admiralty jurisdiction in a tort case. *Id.*

In *Sisson*, this Court gave further direction to the determination of the existence of federal admiralty jurisdiction. In *Sisson* the Court commented on its holding in *Foremost* as follows:

> "In *Foremost* the court unanimously agreed that the purpose underlying the existence of federal maritime jurisdiction is the federal interest in the protection of maritime commerce, and that a case must implicate that interest to give rise to such jurisdiction."

Sisson, 110 S.Ct. at 2896, fn. 2. In *Sisson* the Court clarified that the nexus test adopted in *Executive Jet* and applied in *Foremost*, involved at least a two part analysis. First, the incident must be likely to disrupt commercial activity and, second, there must be "a substantial relationship between the activity giving rise to the incident and traditional maritime activity." *Id.* at 2897.

Shortly after this Court's announcement of a nexus requirement for the exercise of federal admiralty jurisdiction in *Executive Jet*, the United States Court of Appeals for the Fifth Circuit considered the admiralty jurisdiction question in *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974). In *Kelly*, the Fifth Circuit derived four (4) factors significant in the nexus analysis: (1) the functions and roles of the parties, (2) the types of vehicles and instrumentalities involved, (3) the causation and type of injury, and most importantly (4) the traditional concepts of the role of admiralty law. *Kelly* at 525.

In *Sisson* this Court declined to specifically adopt the *Kelly* four factor test because it was not necessary, at that juncture, for analyzing the admiralty jurisdiction question presented. This Court indicated that the test developed in *Executive Jet* and refined in *Foremost* was sufficient in *Sisson*, and at least in cases in which both parties are engaged in similar activities. In the case now before the Court the parties were not involved in the same types of activity. Petitioner, Jerry Cochran, was engaged in the activity of removing paint from the decks of the U.S.S. Independence. Respondents are alleged to have manufactured, sold and supplied the paint. Therefore, regardless of whether the *Foremost* or the *Kelly* test were to be used, the result would be the same. There is no basis upon which to support the admiralty jurisdiction of the federal courts under any accepted theory.

Moreover, every court which has considered the issue of whether to extend federal admiralty jurisdiction to cases involving claims by workers alleging exposure to harmful particles, regardless of the test employed, has declined to so expand that jurisdiction. *See Owens Ill., Inc.*

v. United States District Court, 698 F.2d 967 (9th Cir. 1983); *Keene Corp. v. United States*, 700 F.2d 836 (2d Cir. 1983); *Austin v. Unarco Indus., Inc.*, 705 F.2d 1 (1st Cir. 1983), *cert. denied*, 463 U.S. 1247, 104 S.Ct. 345 (1984); *Lowe v. Ingalls Shipbuilding, a Division of Litton*, 723 F.2d 1173 (5th Cir. 1984); *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119 (9th Cir. 1984); *Harville v. Johns-Manville Corp.*, 731 F.2d 775 (11th Cir. 1984); *Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir. 1985), *cert. denied*, 474 U.S. 970 (1985); *Woessner v. Johns-Manville Corp.*, 757 F.2d 648 (5th Cir. 1985); *Lingo v. Great Lakes Dredge & Dock*, 638 F. Supp. 30 (E.D.N.Y. 1986); *Touchstone v. Land & Marine Applicators, Inc.*, 628 F. Supp. 1202 (E.D. La. 1986); and *Saunders v. H.K. Porter Co., Inc.*, 643 F. Supp. 198 (E.D. Va. 1986). The only exception to this was the Fourth Circuit's holding in *White v. Johns-Manville Corp.*, 662 F.2d 234 (4th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) ("*White II*"). *White II* was explicitly overruled in *Oman, supra.*

Harville is significant not only as Eleventh Circuit precedent, but also as one of the first cases to consider and reject the reasoning of *White II, supra.* The *Harville* plaintiffs alleged exposure to airborne particles (asbestos) while aboard ships in navigable waters. In *Harville,* this Court held that the plaintiffs' claims did not bear a significant relationship to traditional maritime activity. *Harville, supra,* at 783. The Eleventh Circuit applied the four (4) factors set forth in *Kelly, supra.* In analyzing the four (4) factors of the nexus test, the *Harville* court cautioned that: "exclusive focus on any single aspect of the plaintiff's claims produces a mechanistic analysis not entirely consistent with the thrust of *Executive Jet.*" *Harville, supra,* at 784. The *Harville* court concluded that the fourth factor

in the *Kelly* nexus test, the traditional concepts of the role of admiralty law, was the most significant factor and deserved "special emphasis". *Id.*

Jerry Cochran claims to have been exposed to harmful particles while grinding nonskid paint off the surface of the U.S.S. Independence. His claims are no different from the claims of the plaintiffs in the above-cited cases. Accordingly, there is simply no support for extension of federal admiralty jurisdiction to the types of claims set forth by Petitioner.

C. Cochran's Claims Do Not Satisfy the *Kelly* Test for the Exercise of Admiralty Jurisdiction.

1. The Functions and Roles of the Parties.

The Respondents in the instant matter manufactured nonskid paint which allegedly harmed Jerry Cochran during its removal. There is nothing uniquely maritime about the supply of nonskid paint products. Nonskid paint products are supplied for a myriad of land-based uses. This fact militates against extension of admiralty jurisdiction in the instant matter. *Id.* at 784.

Admittedly, Jerry Cochran was a sailor during his alleged exposure to defendant's products. However, it is clear that the mere fact that Petitioner was a sailor does not automatically mandate that his claims be consideration by a federal court sitting in admiralty. *Petersen v. Chesapeake & Ohio R.R. Co.*, 784 F.2d 732 (6th Cir. 1986), *Lingo, supra.* Moreover, no specialized maritime skill was required by Jerry Cochran to perform his duties on the grinding crew aboard the U.S.S. Independence. Jerry

Cochran's use of a tennant machine, a broom, and a shovel during his activities on the grinding crew are identical to the methods that he would have used had he been grinding nonskid paint off a pier adjacent to the U.S.S. Independence. Jerry Cochran was not injured in any function as a gunnery crewman or a steam catapult operator or the like. Rather, Jerry Cochran was allegedly injured in his role as a painter, a role that only coincidentally occurred aboard a ship. Thus, Petitioner cannot reasonably contend that his purpose was within the core purpose of maritime law; "protection of vessels on navigable waters," and therefore of a maritime nature within the meaning of the first prong of the "*Kelly*" analysis. *Harville, supra,* at 784-785.

2. The Types of Vehicles and Instrumentalities Involved.

A consideration of the vehicles and instrumentalities factor in the nexus analysis suggests the United States District Court for the Northern District of Georgia properly declined to exercise federal admiralty jurisdiction in the instant matter. While the alleged injuries here took place aboard a ship as in *Harville* the District Court found that: "the fact that the products were applied aboard ship is at most tangential and has no [more] effect on the character of the plaintiffs' claims than the use of insulation materials simply designed for covering pipes aboard ship." R.6-170. As in *Harville,* "[n]othing about the underlying claims would be different if the [appellant Jerry Cochran] had been employed constructing or repairing buildings on land". *Harville, supra,* at 785. As noted

above, Jerry Cochran used a tennant machine, a broom and a shovel to perform his grinding crew duties, and alleges exposure to nonskid paint. Petitioner does not even contend that the instrumentalities are of a uniquely maritime character.

The vehicles and instrumentalities of Cochran's alleged exposure have no particular marine quality and therefore his claims fail to satisfy the second prong of the *Kelly* test.

3. The Causation and Type of Injury.

"The nonmaritime nature of injuries, injuries that now afflict thousands of land-based workers as well, militates strongly against application of maritime jurisdiction." *Harville, supra,* at 785. Like the *Harville* plaintiffs, Petitioner claims exposure to airborne particles allegedly causing pulmonary disease. The alleged maladies: silicosis, asbestosis, mixed dust pneumoconiosis and/or berylliosis, from which Jerry Cochran allegedly suffers, have no peculiar maritime qualities. The alleged injuries would be identical had his exposure occurred on land.

4. The Traditional Concepts of the Role of Admiralty Law.

As explained in *Harville* the fourth *Kelly* factor, traditional concepts of the role of admiralty law, deserves "special emphasis". *Harville, supra,* at 784. Federalism concerns are implicated in the issue of whether a federal court should exercise its admiralty jurisdiction. "The Constitution's framers and Congress endowed federal

courts with jurisdiction over maritime disputes in order to advance specific federal interest . . . " *Harville, supra,* at 785. "The overriding concern of the maritime law is the federal interest in the need for a uniform development of law governing the maritime industries. *Foremost Ins. Co. v. Richardson,* 457 U.S. 668, 677, 73 L.Ed.2d 300, 102 S.Ct. 2654 (1982)." *Woessner, supra,* at 648.

As the court opined:

> It may be . . . [that particle exposure cases] should be governed by uniform substantive and procedural laws, and that such actions should be heard in the federal courts so as to avoid divergent results and duplicitous litigation in multiparty cases. But for this Court to uphold federal admiralty jurisdiction in a few only fortuitous [shipboard particle exposure cases] would be a most quixotic way of approaching that goal.

Executive Jet, supra at 273-274.

When considering the traditional concepts of the role of admiralty law factor, the purposes of exercising federal admiralty jurisdiction must not be forgotten.

> The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules – rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe. Through

> long experience, the law of the seas knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.

Executive Jet, supra, at 269-270. Jerry Cochran's claims are not encompassed within the traditional concepts of the role of admiralty law as outlined in *Executive Jet.*

Furthermore, the claims of Jerry Cochran are no different from the claims of the *Harville* plaintiffs, or for that matter, from the claims of the plaintiffs in any of the previously cited cases. State law is not only adequate for handling these claims, but also federalism concerns counsel against usurpation by the federal courts of provinces normally set aside for state law. *Harville, supra,* at 786. More importantly, Cochran's claims do not implicate any of the issues normally reserved for federal courts sitting in admiralty, as set forth in *Executive Jet* above.

D. Cochran's Claims Do Not Satisfy The *Foremost* Test For The Exercise Of Admiralty Jurisdiction.

1. Disruption of Commercial Activity.

Clearly the alleged injury of a sailor generated by the grinding of paint off the deck of a ship has no implication in terms of maritime commerce. There is no showing by Petitioner that significant maritime commerce concerns are present in this case.

2. Substantial Relationship With Traditional Maritime Activity.

As discussed above, the activity in which Jerry Cochran was engaged, grinding paint off the deck of a ship, has little to do with traditional maritime activity. Jerry Cochran was allegedly injured while grinding paint off the decks of the U.S.S. Independence. His role and function was not uniquely maritime in nature. He used tools and supplies commonly used on land as well as at sea. His alleged injuries are not maritime in nature and are well known among land-based workers, a fact of which the entire federal court system is aware. These factors suggest that the activity of Jerry Cochran did not bear a significant relationship to traditional maritime activity.

CONCLUSION

The Petition for Writ of Certiorari should be denied in this matter; first, because justiciable concerns as required by Rule 10 of the Rules of the United States Supreme Court are not present. There is no conflict between the circuits. The Eleventh Circuit's analysis is entirely consistent with the established precedent of this Court.

Second, an analysis of the specific facts of Petitioner's claims clearly suggests that admiralty jurisdiction is not applicable. A contrary holding would obviate years of careful consideration of the issue and established precedent. The very reasons that admiralty jurisdiction

should not be invoked here are the reasons enunciated, time and time again, by this Court and the circuit courts which have been presented with this question.

Accordingly, the Petition of Writ of Certiorari should be denied.

Respectfully submitted,

FREEMAN & HAWKINS
ALBERT H. PARNELL, P.C., ESQ.
KIMBERLY A. HOUSTON, ESQ.

Suite 2800
Two Peachtree Tower
Atlanta, Georgia 30383-2606
404/522-0856

Attorneys for Respondents Devoe and Raynolds Co., Inc., Hoechst Celanese Corporation, and Grow Group, Inc.

FORTSON AND WHITE
WILLISTON C. WHITE, ESQ.

200 Atlanta Financial
Center South
3333 Peachtree Road, N.E.
Atlanta, Georgia 30326
404/239-1900

Attorneys for Respondent American Abrasive Metals Co.

Law Offices of
J. WAYNE PIERCE, P.C., ESQ.
J. WAYNE PIERCE

Suite 400
2839 Paces Ferry Road
Atlanta, Georgia 30339
404/435-0500

Attorneys for Respondent Palmer International, Inc.